STATE OF MICHIGAN

COURT OF APPEALS

CLEAR IMAGING, LLC, Plaintiff-Appellant,	UNPUBLISHED June 17, 2014
v	No. 314672 Oakland Circuit Court
SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, d/b/a SMART, Defendant-Appellee.	LC No. 2012-126692-NF

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the majority opinion.

I write separately to highlight why I believe that our court rules do not support certain positions taken by plaintiff. It is my hope that the parties in this and other matters will be guided by this analysis going forward.

First, plaintiff has maintained that it had no obligation to respond to defendant's interrogatories and requests for production of documents, and that the trial court erred in compelling it to do so, because those discovery requests were served by defendant before defendant had answered plaintiff's complaint. For that reason, in fact, plaintiff characterized defendant's motion to compel as an "un-ripe motion to compel discovery," and argued that the discovery requests were "sent prior to Defendant answering the complaint which is procedurally nonsensical and as a matter of practice unusual to state the least."

MCR 2.302(A)(1) unequivocally states, however:

> *After commencement of an action, parties* may obtain discovery by any means provided in subchapter 2.300 of these rules. [Emphasis added].

Further, MCR 2.101(A) states that "[t]here is one form of action known as a 'civil action' ". MCR 2.101(B) states that "[a] civil action is commenced by filing a complaint with a court."

Consequently, once plaintiff commenced this action by filing its complaint, the parties were entitled to obtain discovery as provided in the court rules. Had our Supreme Court wished

to provide that a plaintiff could commence discovery after filing its complaint, and that a defendant could commence discovery only after filing its answer, it could have done so. It did not; it instead provided that after an action is commenced, the "parties" may commence discovery. While plaintiff may consider the rules established by our Supreme Court to be "procedurally nonsensical," those remain the rules by which it is governed in this litigation. Further, while plaintiff may consider the practice of commencing discovery before answering a complaint to be "as a matter of practice unusual to state the least," it is a practice that is expressly allowed by the court rules adopted by our Supreme Court. I therefore am compelled to reject plaintiff's position that it was not obliged to timely respond to defendant's discovery requests.

Second, plaintiff's failure to timely respond to defendant's discovery responses leaves it with a problem under MCR 2.313(D). Subsection (1) of that rule authorizes a trial court to impose "such sanctions as are just" where a party has failed "to serve answers or objections to interrogatories submitted under MCR 2.309, after proper service of the interrogatories" or "to serve a written response to a request for inspection under MCR 2.310, after proper service of the request."

Plaintiff acknowledges that it did not respond to defendant's interrogatories and document requests within the time frame required by MCR 2.309 and 2.310 because it believed that it was not required to do so (as discussed earlier). Plaintiff further acknowledges that it did not move for a protective order, notwithstanding that MCR 2.302(C) expressly authorizes it to do so. As a consequence, the trial court granted defendant's motion to compel, and ordered plaintiff to provide "full and complete" answers to defendant's interrogatories and a "response" to defendant's document requests.

Plaintiff then provided answers and responses within the time allotted by the trial court. However, plaintiff did not provide "full and complete" answers, as ordered by the trial court, but instead asserted for the first time certain objections. Plaintiff's counsel contends that it did so "[c]onsistent with its duty to adequately and zealously represent their client."

The problem is that MCR 2.313(D)(3) specifically provides:

> A failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has moved for a protective order as provided by MCR 2.302(C).

Because plaintiff failed to respond to defendant's discovery requests in a timely fashion, and further failed to file a motion for protective order, the trial court was within its authority to order plaintiff to provide "full and complete" answers, and to subsequently reject plaintiff's belated attempt to interpose objections. Given plaintiff's failure to timely answer, timely object, or move for protective order, I am not inclined to engage in any assessment of defendant's discovery requests, or of whether plaintiff might have been justified in objecting to any of them. The time for that assessment, if necessary or appropriate, has passed. Under our court rules, that train has left the station. Plaintiff failed to timely object, and further failed to move for protective order. Those decisions have consequences.

That said, there is no question that, before imposing sanctions for violating a discovery order, the trial court in this case did not, as is required by our case law, evaluate on the record the relevant factors or articulate any consideration of lesser sanctions than dismissal (other than perhaps implicitly by revising the dismissal order from a "with prejudice" dismissal to a "without prejudice" dismissal). While it is tempting to scour the record in search of information by which we might engage in that exercise ourselves, I am not inclined to do so in this case. First and foremost, that is a role and obligation of the trial court, not this Court in the first instance. Second, it is my anecdotal and wholly unscientific observation that this Court is seeing an increasing number of cases in which trial courts have failed to perform the requisite analysis, perhaps in reliance on this Court doing it on appeal, a practice that I conclude should be discouraged by a remand for the development of a record that can be appropriately reviewed on appeal.

/s/ Mark T. Boonstra